No. 16274

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AUTHORIZED SUPPLY COMPANY OF ARIZONA, a Corporation,
Appellant,

vs.

SWIFT & COMPANY, a Corporation, ARIZONA YORK REFRIGERATION COMPANY, a Corporation, and SOUTHERN ARIZONA YORK REFRIGERATION COMPANY, a Corporation,
Appellees.

ARIZONA YORK REFRIGERATION COMPANY, a Corporation, and SOUTHERN ARIZONA YORK REFRIGERATION COMPANY, a Corporation,
Appellants.

vs.

SWIFT & COMPANY, a Corporation,
Appellee.

OPENING BRIEF OF APPELLANT AUTHORIZED SUPPLY COMPANY.

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Basis of Federal Jurisdiction.

Plaintiff in its complaint against defendant alleged itself to be a corporation incorporated in Illinois and defendant to be a corporation incorporated in Arizona. The jurisdiction of the Court was based upon this diversity of citizenship, and the matter in controversy, exclusive of interest and costs, exceeded the $3,000 that was prerequisite to Federal jurisdiction at the time the complaint was filed. The jurisdiction of the Court was based upon the provisions of Title 28, United States Code, Section 1332.

Statement of the Case.

References to the transcript of Record are indicated as [Tr. .....].

In May, 1955, plaintiff contracted with defendant Arizona York Refrigeration Co. to install certain refrigeration equipment in plaintiff's building in Tucson, Arizona. The installation required, among other things, two refrigeration coils. Arizona York Refrigeration Co. suggested to plaintiff the use of coils made by Bush Manufacturing Co., a Connecticut corporation [Tr. 152]. Arizona York Refrigeration Co. ordered the two coils from the Third-Party Defendant, Authorized Supply Co., the Arizona distributor for Bush products [Tr. 155], ordering the units from the description thereof contained in a catalogue of Bush products which Arizona York Refrigeration Co. had in its possession [Tr. 156]. The coils were thereupon shipped to the defendant Arizona York Refrigeration Co. direct from the Bush factory in Connecticut, and were billed by the factory to Arizona York Refrigeration Co. through Authorized Supply Co. The coils were installed by defendant in plaintiff's building. Thereafter, in December, 1955, one of the coils developed a leak which permitted ammonia gas to escape into plaintiff's storage area, causing the damage to the meat and other products stored there by plaintiff that was the basis for this action.

After the leak had been discovered, the defendant Arizona York Refrigeration Co. (or Southern Arizona York Refrigeration Co., its successor) returned the defective coil to Bush and received in its place from Bush, a new coil unit free of charge [Tr. 167, 170 and 180]. That

replacement unit was thereupon installed in plaintiff's warehouse, and plaintiff was credited with the price of the defective unit (*i.e.,* it received the replacement free). [Tr. 170, 180].

Thereafter, plaintiff brought its action against Arizona York Refrigeration Co. and Southern Arizona York Refrigeration Co., alleging negligence and breach of warranty and seeking as damages the value of the products spoiled by the ammonia gas leaked by the defective unit. The defendants joined Authorized Supply Company as Third-Party defendant, alleging negligence and breach of warranty of fitness implied under Arizona law. All negligence counts were dropped on trial, and both plaintiff and defendants proceeded solely on the theory of breach of warranty.

At the conclusion of Third-Party Plaintiff's case, Third-Party Defendant moved the Court for judgment on the Third-Party Complaint, on the ground that the evidence conclusively established that the defendants and Third-Party Complainants had, in returning the defective coil and accepting a replacement, made a pre-litigation election of remedies that foreclosed their right to recover over against Third-Party Defendant in this action. The motion was denied. Judgment was entered in favor of plaintiff on its Complaint, and in favor of defendants on their Third-Party Complaint against this appellant, Authorized Supply Co.

This appeal was taken from the Court's Findings and fact, Conclusions of Law and judgment against Third-Party Defendant, Authorized Supply Co.

Specifications of Error.

One.

The trial court erred in making Finding of Fact No. 11, in that it is on an immaterial matter. The intention of the parties not to rescind the contract for the purchase of the defective coil was not a proper issue in this case.

Two.

The trial court erred in drawing Conclusion of Law No. 5, for the reason that the facts found by the court established a binding election of remedies as a matter of law.

Three.

The trial court erred in drawing Conclusion of Law No. 7, for the reason that the Third-Party Plaintiff had bindingly elected its remedy and could have no judgment against Third-Party Defendant (this appellant) in this action.

Four.

The trial court erred in denying the Thiry-Party Defendant's Motion for Judgment at the close of Third-Party Plaintiff's case, for the same reasons assigned in the foregoing specifications of error.

Five.

The trial court erred in entering judgment against this appellant (Third Party-Defendant) on the Third Party Complaint, for the reasons assigned in Specifications of Error Nos. One, Two and Three.

ARGUMENT.

This appellant's position may be briefly summarized as follows:

The sale by it to appellee and Third-Party plaintiff Southern Arizona York Refrigeration Company was made in Arizona and covered by the provisions of the Uniform Sales Act as enacted in that state. That Act (Arizona Revised Statutes, Pars. 44-201 *et seq.*) provides, among other things, that an implied warranty of "fitness" and/or "merchantable quality" shall accompany the sale. It sets out the buyer's remedies for breach of that warranty (Par. 44-269). It makes the various remedies exclusive each of the others and provides that an election of any shall bar the others. One of those remedies is return of the goods and restoration of the purchase price. When Southern Arizona York Refrigeration Company returned the defective coil to Bush and Co., in Connecticut, and was provided, free, with a new unit, being credited with the full amount of the purchace price of the defective unit, it made a binding election of remedies which, under the Arizona Statute, precluded its action against Authorized Supply Company for damages resulting from the breach of warranty.

The judgment against this appellant arises out of a breach of implied warranty of fitness of a product sold by it to appellee Southern York Refrigeration Company. The implied warranty arises by virtue of Section 44-215 of the Arizona Revised Statutes, 1956. Section 44-269 (Sec. 69 of the Uniform Sales Act) reads, in applicable part, as follows:

> "A. Where there is a breach of warranty by the seller, the buyer may, at his election:
>
> 1. Accept . . . the goods and set up . . . the breach of warranty by way of recoupment. . . ."

2. Accept or keep the goods and maintain an action against the seller for damages for breach of warranty.

3. . . .

4. Rescind the contract to sell or the sale and . . . if the goods have already been received, return them or offer to return them to the seller and recover the price of any part thereof which has been paid.

B. When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted."

It is this appellant's position that appellee Southern Arizona York Refrigeration Company, by returning the defective coil and being credited with its price, had "claimed and been granted a remedy", and that "no other remedy (i.e., by action for damages) can thereafter be granted".

The remedies provided by Section 44-269 are mutually exclusive. In *Yancy v. Jeffreys* (1932), 39 Ariz. 563, 8 P. 2d 774, the Arizona Supreme Court held:

> "This transaction presents a purchase and sale. The general rule of law is that, in case the terms of the sale are breached by the seller, the buyer has several remedies among which he may choose. He may either (a) affirm the sale, notwithstanding the breach, and carry out his part of the agreement; (b) rescind the sale, returning the property and recovering anything already paid on the purchase price; (c) affirm the sale, and, if he has been damaged by the breach of the contract by the seller, set off the amount of damage on a suit by the seller for the balance of the purchase price; or (d) sue the seller for damages. 55 C. J. 1072. He must, however, elect between these remedies, and is bound by his election."

The quotation set forth above was set out verbatim in *California Steel Products v. Wadlow* (1941), 58 Ariz. 69, 118 P. 2d 67, as being the law of Arizona, the Court therein further saying:

> "The sales statute provides that when a buyer has claimed and has been granted a remedy in any one of these ways, no other remedy can thereafter be granted."

Williston holds this to be the general rule, and in 3 "Williston on Sales", p. 362 *et seq.,* lists twenty-four cases supporting it. In his 1957 supplement to the treatise, the Section (Par. 162) is still headed "The Buyer's Remedies Are Mutually Exclusive", and eight new cases are added in support of that conclusion.

When the defective article has been returned to the seller, and the purchase price repaid by cash, credit, replacement or otherwise, there has been a rescission of the contract as a matter of law.

> "Return of the subject matter . . . will deprive the buyer of any right thereafter to sue for damages." 46 Am. Jur. "Sales" Par. 727 (citing cases and stating that the Uniform Sales Act specifically so provides).

And, from C. J. S.:

> "The buyer may not pursue both remedies (under the Act). Hence, if he has returned the goods and received back what he paid, he cannot sue for a breach of warranty." 77 C. J. S. "Sales" Par. 355, p. 1263 *et seq.*

The following is but a partial list of the many cases which have announced this principle:

Stanley Drug Co. v. Smith Laboratories, 313 Pa. 368, 170 Atl. 274;

Henry v. Rudge, 118 Neb. 260, 224 N. W. 294;

Boviard Mfg. Co. v. Martland, 92 Ohio St. 210, 110 N. E. 749;

Campbell Music Co. v. Singer (D. C. App.), 97 A. 2d 340;

Simmons v. Brooks (D. C. App.), 66 A. 2d 517;

Gatch v. Sears, Roebuck & Co. (U. S. D. C., S. C.), 143 Fed. Supp. 937;

Powers v. Rosenbloom, 143 Me. 361, 62 A. 2d 531;

Claybourn Corp. v. Arneo Press (U. S. D. C., N. D. Ill.), 27 Fed. Supp. 231;

Taber v. Rauch (C. C. A. 5), 22 F. 2d 680;

Arctic Engr. Co. v. Wilson, 272 Wis. 129, 74 N. W. 2d 627;

Willeke v. Neunschwander, 55 Ohio App. 527, 9 N. E. 2d 1018;

Moskowitz v. Flock, 112 Pa. 518, 171 Atl. 400;

Somerton v. International Harvester, 56 Ga. App. 655, 193 S. E. 476;

United Engine Co. v. Junius, 196 Iowa 914, 195 N. W. 606;

Yancey v. Southern Lumber Co., 133 S. C. 369, 131 S. E. 32;

King v. Guy (Mo. App.), 297 S. W. 2d 617;

Lone Star Olds Cadillac Co. v. Vinson (Tex. Civ. App.), 168 S. W. 2d 673;

Nickerson v. Whalen (Mo. App.), 253 S. W. 2d 502.

In *Henry v. Rudge & Guenzel Co.,* 118 Neb. 260, 224 N. W. 294, the Supreme Court of Nebraska, applying Section 69 of the Uniform Act to facts similar to those at bar, said, citing five other Nebraska cases so holding:

> "But, assuming there was a warranty, the plaintiff's testimony shows clearly that the sale was rescinded. She returned the shoes and was fully repaid the purchase price and it was done at her request and voluntarily. Counsel urge that she did not intend to rescind, and that the statement that she would see the defendants later about her injuries indicated that she was not consenting to a rescission. There is no such thing as a partial rescission, except in certain cases where the contract is divisible. Where the sale is for a particular article there can be no partial rescission. After the return of the shoes and the repayment to her of the purchase price, the rescission was complete. In *Apex Chemical Co. v. Compson,* 171 NYS 60, the court held that rescission seems to follow as a matter of law the return of the property, and that the return itself operates as a conclusive presumption of law that the plaintiff intended to rescind. When plaintiff returned the shoes and received payment for the purchase price, it was an irrevocable election to rescind, and her statements to the effect that she would see the defendants later about her injuries was ineffectual to modify or disaffirm her election to rescind.
>
> "Having rescinded the contract, the plaintiff has no right of action for damages for breach of the warranty."

And in *Taber v. Rauch* (C. C. A. 5), 22 F. 2d 681, the court said:

> "Taber had a choice of remedies. He could sue for rescission, or for damages for a breach of warranty;

but he could not take back the consideration, return the pearls, and maintain a suit for breach of warranty. These remedies are inconsistent, and exclusive of each other. *Wilson v. New United States Cattle Ranch Co.,* 73 F. 994; 24 RCL 235; 13 CJ 611; Williston on Contracts, Par. 1464; Williston on Sales, Par. 612."

In *Gatch v. Sears, Roebuck & Co.,* 143 Fed. Supp. 937, the court said:

"He (the buyer) cannot pursue both of these remedies, and an election to pursue one is a waiver of the right to pursue the other. . . . There cannot be a rescission by the buyer coupled with a recovery for damages by reason of an alleged breach of contract."

In addition to the cases cited above, Volume 40 of McKinney's New York Law (Personal Property), at page 825, lists twelve cases in New York alone which, prior to 1948, supported that proposition.

If further indication of the necessary meaning and effect of A. R. S. Par. 44-269 were needed, the history of the Uniform Sales Act in New York would provide it. Prior to 1948, the New York version of the Uniform Sales Act read exactly as our present Section 44-269. This same question of election of remedies came very often before the courts of that state. The decisions followed the general rule: That to return the goods is to rescind; to rescind is to elect the remedy; to elect the remedy is to bar a subsequent suit for damages. See: *Bennett v. Piscitello,* 9 N. Y. S. 269, and the numerous cases listed in "McKinney's Personal Property Law", Vol. 40 of McKinney's New York Laws, pp. 825-826. The 1948 New York Legislature was then called upon to consider changing what was recognized to be a harsh rule. An amendment to that Section of the Uniform Act which is our Section

44-269 was proposed, in which the fourth alternative remedy (Sec. 44-269(A)4) was amended to read:

> "D. Rescind the contract . . . or return the goods and recover the purchase price . . . *and damages recoverable in an action for breach of warranty to the extent . . . not compensated by recovery of the purchase price or discharge of the . . . obligation to pay the same;* (emphasis supplied)."

The committee of the Legislature studying and reporting on the proposed amendment said of it:

> "Its purpose is to enable a buyer who rescinds for breach of warranty to recover not only the price but also damages for the breach. . . ."
>
> New York Legislative Docket 65(F); 1948 Reports, Recommendations and Studies.

After passage of the amendment in 1948, cases from that jurisdiction ceased to be authority in Arizona, which retains the unamended version of the Uniform Sales Act.

It is important to be borne in mind that every one of the cases cited above was decided under either the exact statutory language being considered here or under the rule of the common law, which was the same rule. (See the annotator's comment at 157 A. L. R. 1078.) There can be no substantial question that it is the widespread, general rule under the Uniform Sales Act that where a buyer has returned defective merchandise for replacement or credit, he is foreclosed from suing thereafter for consequential damages for breach of warranty. Among only those jurisdictions from which cases have been cited above, eight, Nebraska, Ohio, the District of Columbia, Illinois, Wisconsin, Iowa and Alabama, and until 1948, New York, have adopted this section of the Uniform Sales Act exactly as it exists in the Arizona Statutes. The purpose of the Act is to establish uniformity.

> "This chapter shall be so interpreted and construed, as to effectuate its general purpose to make uniform the laws of those states which enact it."
>
> 1956 Ariz. Rev. Stats., Sec. 44-274.

In the Superior Court case of *Roberts v. J. C. Penney Co.,* Superior Court of Maricopa County, No. 76505 (1954), the plaintiff purchased a pair of shoes from defendant. Three or four days later, she noticed a defect in them. She returned them to defendant, which replaced them with a new pair. Plaintiff thereafter brought an action for breach of an implied warranty under the Uniform Sales Act, alleging that the defect had caused injury to her feet. A motion by the defendant for summary judgment under the then Section 52-578, A. C. A., 1939 (now A. R. S., Sec. 44-269), was granted, the Court's written opinion saying:

> "It is the court's opinion that . . . a buyer cannot rescind and at the same time retain his rights to sue for special damages under the provisions of (The Act). Whether or not this be a harsh and unjust rule is for legislative determination and not for judicial determination under the and in contravention of the plain language of the statute."

It is submitted that the Arizona statute is unambiguous and the cases construing that state clear. When the defendant here returned the original coils to Authorized Supply for credit on new ones, it made a binding and conclusive election of remedies which bars the action which by the Third-Party Complaint it now seeks to bring.

Respectfully submitted,

May, Lesher & Dees,

Attorneys for Appellant Authorized Supply Company.

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